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20 UNITED STATES DISTRICT COURT

21 NORTHERN DISTRICT OF CALIFORNIA

22 SAN JOSE DIVISION

23 ZYNGA INC., a Delaware Corporation,

24 Plaintiff,

25 v.

26 VOSTU USA, INC., a Delaware Corporation;

27 VOSTU LLC, a Delaware Corporation;

VOSTU LTD., a Cayman Islands

28 Corporations; and DOES 1-5

Defendants.

CASE NO. CV 11-2959 EJD

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
VOSTU'S *EX PARTE* APPLICATION
FOR TEMPORARY RESTRAINING
ORDER ENJOINING ZYNGA FROM
PURSUING BRAZILIAN LITIGATION**

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1 **I. INTRODUCTION**

2 Vostu requests the Court's immediate assistance in preventing a grave injustice and a
3 threat to this Court's jurisdiction, which plaintiff, Zynga Inc., itself initially invoked to resolve the
4 parties' dispute.¹ Within the last several days, Zynga commenced a virtually identical action,
5 seeking identical relief, for copyright infringement in Brazil. The copyrights that Zynga's suit in
6 Brazil seeks to enforce are all copyrights that its suit here seeks to enforce. All four of Vostu's
7 games that Zynga challenges in Brazil are games that Zynga challenges here.²

8 With no notice to Vostu, and without Vostu having an opportunity to be heard, Zynga
9 sought and obtained a preliminary injunction in Brazil directing Vostu to shut down four of its
10 popular online social games. Vostu can only comply with the injunction Zynga obtained by
11 blocking games that reside on computer servers located in the United States. If Zynga persists
12 with its Brazil litigation and forces Vostu to comply with that injunction, Vostu will be reduced to
13 a small fraction of its total operations. The injunction in Brazil is scheduled to take effect this
14 Friday, August, 12. Hence, Vostu must seek this Court's immediate intervention. This Court has
15 ample authority to issue an anti-suit injunction, requiring Zynga to suspend its suit in Brazil and
16 proceed with this suit for alleged copyright infringement in all of the games it challenged both
17 here and in Brazil. The Court should issue a TRO precluding Zynga from pursuing the Brazil
18 litigation and requiring Zynga to halt its injunction request in Brazil, and it should set the matter
19 down for a briefing on a preliminary injunction against Zynga's abusive prosecution of the
20 redundant Brazil suit.

21 The parties to this case (also parties to the new case in Brazil³) are fierce competitors in
22 the popular and growing market for "online social games" that are played on social networking
23

24 ¹ Vostu refers to all three named and served defendants, Vostu USA, Inc., Vostu LLC, and Vostu,
25 Ltd. Vostu, LLC has never been served in this litigation.

26 ² This suit includes an additional challenge to a Vostu game that Zynga did not include in the
27 Brazil suit..

28 ³ As discussed below, Zynga added a Vostu Brazilian entity, as well as Google's Brazilian
subsidiary, to the complaint in Brazil. The presence of Zynga as Plaintiff and Vostu as Defendant
in both cases satisfies the "same parties" requirement for an anti-suit injunction.

1 platforms like Facebook. Zynga first explored the possibility of eliminating Vostu as competition
2 over a year ago, when it initiated partnership discussions (that lasted for months) with Vostu.
3 Zynga did not say anything to Vostu about alleged infringement of its games during those
4 discussions. On June 16, 2011, Zynga tried a different tack to eliminate competition from Vostu,
5 by filing its complaint for copyright infringement in this Court. Zynga larded its complaint with
6 deceptive side-by-side “screen shots” of images from the two companies’ online social games and
7 insisted that similarities between the two images necessarily resulted from Vostu’s copying
8 Zynga’s copyrighted expression. Even before notifying Vostu, Zynga provided its pleadings to
9 press outlets, one of which reported that Zynga had declared, “WAR! Zynga Sues the Hell Out of
10 Brazilian Clone Vostu.” TechCrunch, June 16, 2011, attached as Ex. B to Declaration of Carolyn
11 Hoecker Luedtke (“Luedtke Decl.”).

12 What Zynga evidently did not expect is that Vostu would fight back vigorously and
13 defend itself in this Court. On July 20, Vostu answered Zynga’s complaint, and filed its own
14 counterclaims seeking a declaration that Vostu’s games do not infringe Zynga’s copyrights.
15 Vostu’s counterclaims demonstrated that Zynga’s side-by-side comparisons did not give the
16 Court the whole picture. Vostu showed that element after element that Zynga featured in its
17 complaint existed in online games in similar game genres well before Zynga released its games.
18 The complete picture is damning to Zynga’s claim of copyright infringement for two reasons.
19 First, the existence of the same elements in other games strongly suggests that Zynga copied
20 those elements from pre-existing games, something Zynga has a well-established reputation for
21 doing. *See Vostu’s Answer & Counterclaims (“Answer”)* (Dkt. No. 18), Luedtke Decl., Ex. A.
22 Zynga cannot claim that it owns purportedly infringed elements that are not *original* to Zynga.
23 *See Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). Second, the widespread
24 use of functional or stock elements for common genres—tables, customers, chefs and cookbooks
25 in “café” games; streets, plots of land, and hamburger-topped fast-food outlets in “city” games—
26 is proof that Zynga cannot enforce those elements against Vostu under the doctrines of
27 functionality and *scènes à faire*. *See Apple Computer Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1446
28 (9th Cir. 1994).

1 If Zynga actually believed it had a meritorious claim based on slavish copying of
2 copyright-protected elements, one reasonably would have expected that it would move for a
3 preliminary injunction after filing its litigation here, as frequently happens in copyright cases and
4 as Zynga's U.S. attorneys initially suggested it would. Zynga did not do that. Zynga originally
5 said it wanted expedited discovery. Vostu's counsel responded that it agreed and that the parties
6 should immediately exchange source code. Zynga's counsel thereafter said that his client did not
7 even want expedited discovery, which would have allowed a prompt analysis of Zynga's claim.
8 Luedtke Decl., Ex. H. Zynga thereafter indicated no interest in pursuing a preliminary injunction
9 motion here and instead was content to await discovery and active litigation in accordance with
10 the Rules, which would mean the soonest discovery would start would be this fall, around the
11 time of the first case management conference, on November 4. Order Setting Initial Case
12 Management Conference and ADR Deadlines (Dkt. No. 4).

13 Unbeknownst to Vostu, Zynga actually was repackaging the same claims for a different
14 forum, Brazil. Brazil regularly allows a plaintiff to get a preliminary injunction without affording
15 a defendant notice or an opportunity to be heard. Social games are very popular in Brazil, and
16 Vostu is the market leader in that country. Zynga attacked Vostu with a secret preliminary
17 injunction request last week with a court in Sao Paulo, Brazil. On August 3, 2011, without any
18 notice to Vostu, without allowing a response, and without imposing an injunction bond, a court in
19 Sao Paolo granted Zynga's request for an injunction, and ordered Vostu to shut down four
20 games—all of which are already at issue in Zynga's complaint in this case

21 While Zynga never provided its complaint to Vostu—indeed, Zynga did not provide and
22 still has not provided Vostu with any of the papers on which it based its preliminary injunction
23 request—Zynga handily provided the complaint and notice of the Brazilian court's decision to the
24 same website that has previously announced Zynga's declaration of "WAR!" *See* Luedtke Decl.,
25 Ex. C (TechCrunch, Aug. 3, 2011). Zynga is thus treating its Brazil litigation as both a powerful
26 end-run around this court and as a vehicle for a publicity attack using a prominent technology
27 blog as its publicist.

28 Why does it matter, and why does Vostu need this Court's urgent attention? Because

1 Zynga is improperly seeking in Brazil the preliminary injunction it decided not to seek here. And
2 it is doing so by exploiting procedures there that allow secret injunctions, that allow Zynga to
3 avoid furnishing its moving papers to Vostu, that allow a catastrophic injunction without the
4 protection of a bond, and that sharply curtail discovery. If Zynga had filed only in Brazil, it
5 would be a different matter. But Zynga has now filed there redundantly after confronting a
6 powerful counterclaim for declaratory relief by Vostu that exposed the misleading allegations of
7 Zynga's complaint. Taking into account all the circumstances, Zynga's conduct is an affront.

8 The threat to Vostu from Zynga continuing its Brazil suit and enforcing its injunction is
9 grave. In the past, service interruptions of even a few days have lead to the loss of millions of
10 Vostu users. Shutting those games down for the extended life of litigation and appeals in the
11 Brazilian legal system will mean the end of the games, the decimation of Vostu's Brazil user base
12 (by far the overwhelming majority of the company's users), and, much to Zynga's delight, the
13 elimination of the biggest obstacle to Zynga's domination of social gaming in Brazil. Not
14 coincidentally, Zynga recently launched its games in Portuguese, and within the last month
15 increased its marketing in Brazil and released Brazil-themed promotions within its games.

16 Zynga's continued pursuit of its Brazilian litigation also will mean the usurpation of this
17 Court's jurisdiction. Zynga's counsel has blithely claimed that the Brazil lawsuit is completely
18 independent of this case, and instead is about "Vostu's acts of infringement and unfair
19 competition in Brazil and the resulting harm to Zynga and unwitting Brazilian consumers."
20 Luedtke Decl., Ex. O. That cannot be squared with Zynga's complaint, which charges Vostu with
21 violating Zynga's display rights; if that is infringement—and Vostu disputes it is—then that takes
22 place on computer servers *in the United States*. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d
23 1146, 1160 (9th Cir. 2007) (infringement of copyright owner's right to publicly display its works
24 takes place on computer servers that store and serve images to users). The damages and injunctive
25 relief that Zynga seeks in Brazil duplicate the relief Zynga seeks in this case. But this Court's
26 jurisdiction to determine whether Zynga is entitled to this relief—jurisdiction that Zynga invoked
27 before turning to Brazil—will be overtaken and disposed of by the courts in Brazil. Even
28 assuming the worst for Vostu, there is a serious risk of duplicative damages and inconsistent

1 injunctions that would leave Vostu unable to satisfy both courts' requirements.

2 This Court has the well-established authority to preserve its primary jurisdiction over this
 3 dispute and to issue an injunction to Zynga to halt its suit in Brazil. "Such injunctions allow the
 4 court to restrain a party subject to its jurisdiction from proceeding in a foreign court in
 5 circumstances that are unjust." *E. & J. Gallo Winery v. Andina Licores S.A.*, 446 F.3d 984, 989
 6 (9th Cir. 2006) ("*Gallo*"). Vostu clearly satisfies all three requirements for an anti-suit injunction
 7 under controlling Ninth Circuit authority in *Gallo* and *Applied Medical Distribution Corp. v.*
 8 *Surgical Co. BV*, 587 F.3d 909, 915 (9th Cir. 2009):

9 (1) The parties are the same, and the issues in this case are dispositive
 10 of the action in Brazil. *Applied Medical*, 587 F.3d at 915. As explained in the
 11 accompanying declaration of Professor Ronaldo Lemos, the head professor of
 12 intellectual property law and director of the Center for Technology & Society at
 13 the Fundação Getulio Vargas (FGV) Law School in Rio de Janeiro, Brazilian
 14 copyright law follows United States copyright law on the dispositive issues of
 15 originality, functionality, and scènes à faire. Declaration of Ronaldo Lemos
 16 ("Lemos Decl.") ¶¶ 15-22. Zynga has conceded as much by drafting its Brazilian
 17 complaint as a virtual answer to Vostu's counterclaim in this Court on the scènes à
 18 faire doctrine. *Id.* ¶¶ 13-14. If Zynga wants to make those arguments, it can and
 19 must do so in this Court.

20 (2) Zynga's continued prosecution of the injunction proceedings will
 21 "frustrate a policy of" this Court, *Gallo*, 446 F.3d at 991, namely, the interest of
 22 the federal courts in "detering forum shopping" and ensuring that "that
 23 adjudication of the same issues in two separate actions [does not] result in
 24 inconvenience, inconsistency, and a possible race to judgment." *Ibeto*
 25 *Petrochemical Indus. Ltd. v. M/T Beffen*, 475 F.3d 56 (2d Cir. 2007).

26 (3) An anti-suit injunction directed to Zynga "would not have an
 27 intolerable impact on comity." *Applied Medical*, 587 F.3d at 919-20. In fact, the
 28 suit would have no effect on comity. The injunction would respect the Courts in

1 both jurisdictions. That is something that Zynga—which in essence has shopped
 2 forums across borders—has not done and will not do unless restrained.

3 Time is of the essence. If Zynga does not halt its prosecution of the Brazilian litigation
 4 and injunction immediately, questions about this Court’s jurisdiction will be academic. There is
 5 zero harm to Zynga from the issuance of a TRO granting an anti-suit injunction, to be followed
 6 by prompt resolution of the matter on a preliminary injunction schedule. Zynga waited for
 7 months, and in some instances years, while users were playing Vostu’s games and building their
 8 assets within those games, and while it was courting Vostu’s partnership, and it has been willing
 9 to wait for nearly two months (and counting) without any request for this Court to issue an
 10 injunction. Zynga can certainly wait a few additional weeks for Vostu to receive some due
 11 process when facing an injunction that effectively seeks a corporate death sentence.

12 **II. BACKGROUND**

13 **A. The Parties to Both Lawsuits: Zynga and Vostu**

14 Zynga and Vostu are fierce competitors in the booming market for online social games.
 15 Zynga is the biggest developer of online social games in the world, with more than 250 million
 16 monthly active users. Luedtke Decl., Ex. D. Zynga has built its business by imitating the games
 17 of its competitors. Its business model has been described as follows: “Steal someone else’s game.
 18 Change its name. Make millions. Repeat.” Answer ¶ 6 & Ex. A at 1; *see also id.* ¶ 7 & Ex. A at
 19 13 (quoting CEO Mark Pincus as having told Zynga employees, “You’re not smarter than your
 20 competitor. Just copy what they do and do it until you get their numbers.”).

21 Vostu also makes social games and is a threat to Zynga’s global domination. Vostu
 22 creates social games in the Portuguese language. It is the preeminent company with games in
 23 Portuguese, which are played throughout the world, including in Portugal, Brazil, and the United
 24 States. Vostu’s games are hosted on servers in the United States operated by Amazon; its games
 25 are available to users around the world on Facebook and on Google’s Orkut social platform; and
 26 it has over 500 employees worldwide, including staff in Argentina, Brazil, and the United States.
 27 Kafie Decl. ¶¶ 5-6.

28 Vostu launched its first product, an online soccer game called Joga Croque, more than two

1 years ago, in May 2009. *Id.* ¶ 6. Thereafter, Vostu launched a series of other successful games—
2 MiniFazenda in November 2009; Café Mania in June 2010; Vostu Poker in August 2010; Pet
3 Mania in October 2010; Mega City in April 2011. *Id.* Each of these games falls within a well-
4 established genre of online social games (farm, café, poker, pet, and city) in which many other
5 developers have produced games with similar features. All of these games have been available
6 and widely popular with online social gamers—and even apparently popular enough to attract
7 Zynga’s interest—for months, in most cases more than a year.

8 Vostu has enormous business momentum. It now has more than 1.5 million monthly
9 active users, and in the last week alone, the company’s games picked up more than 450,000
10 additional active monthly users. Luedtke Decl., Ex. E. Vostu presents a competitive threat to
11 Zynga because Vostu has quickly become the most prominent social game provider among a
12 segment of the market—namely, the rapidly-growing population of internet users in Brazil and
13 throughout South America—that Zynga has not been able to dominate. In addition, as of May
14 2011, Vostu has made its games available to Facebook users, which threatens Zynga’s dominance
15 on that social platform. Kafie Decl. ¶ 6.

16 The parties were not strangers before this litigation started. Zynga has tried for more than
17 a year to break into the Portuguese-language market for social gaming. Beginning in August
18 2010, Zynga’s business development team made several contacts with Vostu, to explore a
19 partnership. *Id.* ¶¶ 21-24. The parties continued to correspond, and even had executives meet in
20 person, in January 2011. *Id.* ¶¶ 25-32. Zynga obviously had reviewed Vostu’s games and noticed
21 their popularity in Brazil. But during months of discussion, Zynga said nothing about Vostu
22 copying or otherwise infringing any of Zynga’s games. *Id.* ¶¶ 24-27, 29.

23 Earlier this year, however, Zynga switched gears and launched a calculated campaign to
24 destroy its competitor. First, Zynga launched all of its existing games in Portuguese. *Id.* ¶¶ 15,
25 33. Zynga then hired a former Vostu employee to run its newly launched Brazilian operations.
26 *Id.* ¶¶ 16, 33. Around the same time, Zynga began marketing its games in Brazil. *Id.* ¶¶ 17-18.
27 Then, Zynga filed this lawsuit and publicized it prominently. *Id.* ¶ 34. And, since this litigation
28 started, a recruiting firm, presumably acting at Zynga’s behest, appears to be targeting key Vostu

employees, using the litigation to try to shake their confidence in, and loyalty to, Vostu. *Id.* ¶ 19. Then, a few weeks ago, Zynga launched Brazilian themed promotional items in its games. *See* Luedtke Decl., Ex. P. Most recently, as discussed below, Zynga launched its litigation in Brazil. All of this conduct, taken together, leaves a firm impression that Zynga is bent on destroying Vostu as competition.

B. Litigation in This Court

On June 16, 2011, Vostu learned that this suit had been filed through a prominent industry website, TechCrunch. Kafie Decl. ¶ 34. Zynga provided its complaint and accompanying exhibits to TechCrunch, along with a press release, and caused them to be posted online before Vostu had access to the papers. The TechCrunch website, having received a courtesy copy of the pleadings from Zynga, ran a story with the headline “WAR! Zynga Sues the Hell Out of Brazilian Clone Vostu.” Luedtke Decl., Ex. B.

Soon after filing the Complaint, Zynga demanded access to Vostu’s source code and threatened to seek expedited discovery and a preliminary injunction. Luedtke Decl., Ex. F. Vostu responded with an offer for counsel to exchange their clients’ source code, so that both parties and their counsel could immediately evaluate Zynga’s counsel’s claims that Vostu had copied Zynga’s source code. Zynga’s attorneys then backed away from their initial demand for source code and refused the exchange offer. Luedtke Decl ¶¶ 10-13, Exs. G & H. Vostu also asked Zynga to identify any portions of the games at issue that it believed infringed Zynga’s copyrights, so that Vostu could consider Zynga’s specific concerns and there could be an expedited exchange of discovery prior to any preliminary injunction motion. Zynga responded by identifying one type of game it believed Vostu was developing, and said it would want to seek an injunction against that game, following expedited discovery. Vostu then explained that it was not developing a game in the genre described by Zynga. Luedtke Decl., Ex. H. Vostu’s counsel stressed that Vostu wanted an immediate exchange of source code in expedited discovery if Zynga were to seek a preliminary injunction. Zynga’s counsel later notified Vostu’s counsel that Zynga did not wish to take any expedited discovery in this litigation and thus implied that it would not seek any preliminary injunction here. Luedtke Decl., ¶¶ 10-13 & Exs. G-H. Vostu’s

1 counsel continued to reach out to Zynga to see what could be done to move the litigation along
 2 here, specifically including an early mutual exchange of source code for comparison. Zynga's
 3 counsel did not respond. *See id.* ¶ 14.

4 Vostu then responded forcefully to Zynga's complaint. It filed a 59-page answer and
 5 counterclaim seeking a declaration of non-infringement on the ground that "the features and
 6 elements that Zynga seeks to enforce are not Zynga's original creations" and are not "enforceable
 7 against others." Answer ¶¶ 143-349 (Luedtke Decl. Ex. A). Whereas Zynga's widely-broadcast
 8 claims of copyright infringement rested entirely on misleading screenshots, which Zynga had
 9 carefully selected and cropped to create the illusion of copying, Vostu's counterclaim put these
 10 images in perspective, demonstrating that the supposedly "copyrighted" elements on which
 11 Zynga bases its lawsuit are, in truth, virtually identical to the elements of numerous other social
 12 games, including many that *preceded* Zynga's supposed original creations.

13 Vostu's counterclaim described in graphic detail how Zynga had developed its own games
 14 by copying features that other companies had pioneered. The counterclaim showed how the
 15 "copyrighted" image in Zynga's complaint regarding its city-building game in fact looked like six
 16 other online games in this genre, including three that pre-dated Zynga's CityVille. *Id.* ¶¶ 15-20,
 17 225-268. The counterclaim likewise demonstrated that Zynga itself had appropriated wholesale
 18 the gameplay of a competitor's product when Zynga launched Café World, one of the games on
 19 which Zynga bases its claims. *Id.* ¶¶ 149-224. The counterclaim thus demonstrated how the
 20 images claimed by Zynga as its "intellectual property" are in fact nothing more than a collection
 21 of unprotectable stock elements and *scènes-a-faire*, which game developers have used in these
 22 genres for years, if not decades. *See also id.* ¶¶ 269-305 (farm games); *id.* ¶¶ 306-322 (pet-care
 23 games); *id.* ¶¶ 323-332 (poker games).

24 C. The Brazil Litigation

25 Obviously chagrined by Vostu's robust defense in this litigation, where defendants gain a
 26 hearing before the court imposes drastic relief, where the parties get real discovery, and where
 27 courts protect enjoined parties with injunction bonds, Zynga went forum shopping. Last week, it
 28 sought an injunction in Brazil, where judicial procedures allowed it to present its papers and

1 argument *ex parte*, without notice to Vostu, and where there is only very restricted discovery at
 2 any point in a case. Zynga also added additional entities as defendants—including Vostu’s
 3 Brazilian subsidiary, which has marketing operations, and Google’s Brazilian subsidiary, whose
 4 social-networking platform popular in the Portuguese language, Orkut, hosts Vostu’s games—but
 5 Zynga’s claims against these entities in Brazil are derivative of, inseparable from, and dependent
 6 on the underlying copyright claims it asserts in this Court. *See* Luedtke Decl., Exs. I & J. In its
 7 Brazil submissions, Zynga presented a different, but similarly misleading, collection of images
 8 from games on which it had already based its complaint in this Court, coupled with the testimony
 9 of multiple expert witnesses who said they had reviewed a selected set of “images” of Zynga’s
 10 and Vostu’s games and concluded that such images were not “stock” images and that Vostu was
 11 therefore guilty of infringement. *Id.* Zynga drafted its complaint in Brazil to steer around the
 12 embarrassing details of Vostu’s counterclaims before this Court, and to take advantage of a sneak
 13 attack in Brazil that would offer Vostu no pre-injunction opportunity to respond there as it had
 14 responded in this Court.

15 On the basis of papers that Zynga did not provide and has not provided to counsel, and
 16 without a transcript to record what Zynga’s Brazilian counsel said during an *ex parte* meeting
 17 with the judge, Zynga obtained an injunction from the Brazilian court with no injunction bond.⁴
 18 Vostu had no pre-injunction opportunity to present argument or evidence of its own. Luedtke
 19 Decl., Exs. K & L; Declaration of Raphael Nehin Correa (“Correa Decl.”) ¶¶ 3-4, 8. The
 20 injunction purported to require Vostu to take its games offline on Friday, August 5. Luedtke
 21 Decl., Exs. K & L. Under the injunction, Vostu is subject to a daily fine equivalent to \$13,000
 22 (US) as long as its games remain online. *Id.* Vostu’s counsel was able to obtain a postponement
 23 of the effective date of this injunction to this Friday, August 12, 2011. Luedtke Decl., Exs. M &
 24 N. Vostu intends to file an appeal of the injunction before an appellate court in Sao Paulo.
 25 However, if the injunction goes into effect on Friday, Vostu’s games will be enjoined by the
 26 Brazilian court. Luedtke Decl., Exs. M & N.

27 ⁴ Zynga did have to provide the usual bond that is required for a foreign plaintiff to file a lawsuit
 28 in Brazil.

1 In Brazil, Zynga did not submit any of the numerous expert declaration cited in its
2 preliminary injunction motion to the court nor has Zynga made any of that evidence—if it
3 exists—available to Vostu’s counsel in Brazil. *See* Correa Decl. ¶ 6. This is highly unusual even
4 in Brazil. *See id.* ¶ 7. As a result, the court in Brazil decided a motion for preliminary injunction
5 without the submission of any evidence. Further, Zynga did not provide even a copy of its secret
6 Brazilian motion for preliminary injunction to Vostu. However, even though Zynga did not see
7 fit to serve Vostu or its attorneys with the pleadings or supporting declarations in the Brazilian
8 case, Zynga did provide a copy of the Portuguese motion for preliminary injunction to the
9 TechCrunch website, along with along with an English translation of the Brazilian preliminary
10 injunction order (just as Zynga had provided TechCrunch with a pre-filing copy of its complaint
11 in this Court). Luedtke Decl. ¶¶ 4-5 & Exs. B-C. To this day, Zynga has not served the
12 preliminary injunction motion or the declarations Zynga says supports it on Vostu in Brazil.
13 Correa Decl. ¶ 6. After the injunction had already issued, Vostu’s attorneys in this case requested
14 a courtesy copy of the papers from Zynga’s U.S. counsel; counsel refused to provide the papers
15 unless Vostu’s U.S. counsel consented to accept Brazilian service of process. Luedtke Decl. ¶ 19
16 & Ex. O.

17 If not dissolved or suspended, the injunction issued by the Brazilian trial court will have a
18 crippling, if not lethal, effect on Vostu’s business. Every day, 150,000 new users who would
19 have registered to play a Vostu game will be unable to do so. Kafie Decl. ¶ 10. The more than 6
20 million users who play Vostu’s games—on average, 7 out of every 10 days—will be unable to
21 access these games at all. *Id.* They will lose access to virtual assets they have accumulated over
22 the course of their game play until now. *Id.* ¶ 14. Vostu estimates that if the injunction is in place
23 for seven days, it will permanently lose 75% of its users for the games at issue, and the games at
24 issue make up the vast majority of Vostu’s users. *See id.* ¶¶ 12-13.

25 There is hard evidence these users will leave Vostu’s platform and will not return—the
26 non-judicial outcome that Zynga earnestly wants, without an injunction bond protecting Vostu, in
27 its quest to dominate the Brazilian marketplace. In April 2010, Vostu’s servers went down
28 because of a technical problem at Amazon and its games were offline for a period of between

several hours and two days. For the games that were unavailable for that short period of just days, Vostu estimates that between 15 and 20 percent of their users were permanently lost. *Id.* ¶ 12. For some of these games, the decimated user base never returned to the record-high number of pre-outage users. *Id.* ¶ 13.

These losses are certain to occur because daily users of social games do not remain idle for long. There are a plethora of competing products on the market, and other companies in this fiercely competitive space offer games with similar features and themes. Not coincidentally, in the weeks before springing its Brazilian trap, Zynga increased its efforts to attract users to its own games in Brazil. Leading up to the secret injunction, Zynga launched a variety of special Brazil focused promotional items in its games. *See* Luedtke Decl. ¶ 20 & Ex. P (displaying special Brazil-focused game items appearing in Zynga's games on and around July 21-22, 2011). In addition, Zynga's marketing efforts for its games within Brazil visibly increased. *See* Kafie Decl. ¶¶ 15-18. If Zynga succeeds in shutting down the most popular online social games in Brazil—Vostu's games—the market will be primed for those 35 million registered users that are displaced to turn instead to Zynga's games, which heretofore had not gained market traction in Brazil.

III. ARGUMENT

The Court “derive[s] the ability to enter an anti-suit injunction” from its “equitable powers. Such injunctions allow the court to restrain a party subject to its jurisdiction from proceeding in a foreign court in circumstances that are unjust.” *Gallo*, 446 F.3d at 989.⁵ The “injunction operates *in personam*: the American court enjoins *the claimant*, not the foreign court.” *Gallo*, 446 F.3d at 989 (emphasis added). Although the power to issue an anti-suit injunction is one that “should be used sparingly,” the Court “*ha[s] a duty to protect*” its “legitimately conferred jurisdiction to the extent necessary to provide full justice to litigants.” *Id.* at 989, 995 (emphasis added).

⁵ *See also, e.g., Seattle Totems Hockey Club, Inc. v. Nat'l Hockey League*, 652 F.2d 852, 855 (9th Cir. 1981) (a “federal district court with jurisdiction over the parties has the power to enjoin them from proceeding with an action in the courts of a foreign country”); *In re Icenhower*, 398 B.R. 902, 910-11 (Bkrtcy. S.D. Cal. 2008) (“It is well established among the courts of appeals that federal courts have the power in appropriate cases to enjoin foreign suits by persons subject to federal court jurisdiction.”).

1 Requests for injunctive relief traditionally are evaluated under the four-part test articulated
 2 by the Supreme Court in *Winter v. Natural Resourced Defense Council, Inc.*, 555 U.S. 7 (2008).
 3 The request for an anti-suit injunction is evaluated under a different standard, although one that is
 4 fully consistent with *Winter*. In particular, Vostu need not demonstrate that it is likely to succeed
 5 on the merits of its counterclaim, because the purpose of an anti-suit injunction is not to obtain
 6 relief on the merits but to ask the Court to order the opposing party to halt its foreign litigation.
 7 Ninth Circuit law is clear that Vostu need “only demonstrate that the factors specific to an anti-
 8 suit injunction weigh in favor of granting the injunction.” *Gallo*, 446 F.3d at 991. *See also E. &*
 9 *J. Gallo Winery v. Andina Licores S.A.*, 440 F. Supp. 2d 1134, 1137-38 (E.D. Cal. 2006) (“As the
 10 Ninth Circuit pointed out in *Gallo*, where the issue is one of anti-suit injunction, the applicant
 11 need not meet the normal test for the granting of a preliminary injunction; that is, the likelihood
 12 of success on the merits. Rather, the applicant ‘need only demonstrate that the factors specific to
 13 an anti-suit injunction weigh in favor of granting the injunction.’”).

14 Under Ninth Circuit law, there are three requirements for an anti-suit injunction: (1) that
 15 “the parties and the issues are the same,” and that “the first action is dispositive of the action to be
 16 enjoined”; (2) that the foreign litigation would “frustrate a policy of” the Court issuing the anti-
 17 suit injunction; and (3) that “the impact on comity” from issuing an injunction “would be
 18 tolerable.” *Applied Med. Distrib. Corp. v. Surgical Co. BV*, 587 F.3d 909, 913 (9th Cir. 2009)
 19 (quoting *Gallo*, 446 F.3d at 991, 994). Vostu readily satisfies each of these criteria.

20 *Winter*’s requirement that the moving party be at risk of irreparable harm to obtain an
 21 injunction, 555 U.S. at 22-23, is fully consistent with the above standard and satisfied on the facts
 22 of this case. The irreparable harm to Vostu in the absence of an injunction is clear: if Zynga
 23 continues its proceedings in Brazil and is able to enforce its injunction there, that threatens to end
 24 or seriously debilitate Vostu as a going concern. Moreover, Zynga’s Brazil action irreparably
 25 undermines this Court’s jurisdiction to resolve the case that Zynga started, and as to which Vostu
 26 has joined issue with its powerful and meritorious counterclaims. Zynga now has no power to
 27 avoid the case in the United States by voluntarily dismissing its action here, because Vostu’s
 28 counterclaim would survive. Instead, Zynga is using the Brazil action to kill off Vostu and to

1 make this case effectively moot.

2 **A. The Parties and Issues Are the Same in the U.S. and Brazilian Actions, and**
 3 **the U.S. Action Is “Dispositive” of the Dispute in the Brazilian Action.**

4 The “first step” in “deciding if an anti-suit injunction is appropriate is determining
 5 ‘whether or not the parties and the issues are the same, and whether or not the first action is
 6 dispositive of the action to be enjoined.’” *Applied Medical*, 587 F.3d at 915 (quoting *Gallo*, 446
 7 F.3d at 991). This condition is plainly met here.

8 **1. The Parties Are the “Same.”**

9 The parties are the “same” between the U.S. and Brazilian actions. As courts have made
 10 clear, this requirement does not mean that the parties must be “identical,” but only that they are
 11 “affiliated or substantially similar, such that their interests are represented by one another.” *Int’l*
 12 *Equity Invs., Inc. v. Opportunity Equity Partners Ltd.*, 441 F. Supp. 2d 552, 562 (S.D.N.Y. 2006).
 13 *See also Storm LLC v. Telenor Mobile Commc’ns AS*, No. 06 Civ. 13157, 2006 WL 3735657, at
 14 *6 (S.D.N.Y. Dec. 15, 2006) (“Although Alpren is a participant in the Ukrainian litigation,
 15 Alpren is not merely a shareholder of Storm but is part of a family of affiliated corporations that
 16 collectively owns the entirety of Storm. The real parties in interest in the Ukrainian lawsuit are
 17 essentially the same entities that are involved in the arbitration here.”). *See also Athina Invs. Ltd.*
 18 *v. Pinchuk*, 443 F. Supp. 2d 177, 180-81 (D. Mass. 2006) (“perfect identity of parties is not
 19 necessarily required to meet the threshold inquiry”).

20 Here, the parties are clearly “affiliated or substantially similar, such that their interests are
 21 represented by one another.” Zynga’s complaint in this Court names Vostu, Ltd., Vostu USA,
 22 Inc., Vostu LLC, and Vostu, LLC as defendants. Zynga’s Brazilian complaint names Vostu, Ltd.,
 23 Vostu USA, Inc., and Vostu Participações do Brasil Ltda. as defendants. Vostu, Ltd. is the parent
 24 corporation of Vostu, USA Inc., as well as Vostu LLC, which are both U.S.-based subsidiaries.
 25 *See Kafie Decl.* ¶¶ 2-4. Vostu Participações do Brasil Ltda., named in the Brazilian action but not
 26 the U.S. action, is wholly owned by Daniel Kafie, chief executive officer of Vostu, Ltd., who
 27 owns it in trust for Vostu, Ltd. *Id.* Furthermore, Vostu, LLC, named only in the U.S. action,
 28 transferred all of its assets to Vostu LLC, a subsidiary of Vostu, Ltd., and is an entity that does

1 not serve any role in Vostu's operations. *See id.*

2 The fact that Zynga's complaint in Brazil lists *additional* parties in the foreign suit—
 3 namely, Google's Brazilian subsidiary—does not change the core identity of the parties. *See,*
 4 *e.g., Paramedics Electromedicina Comercial, Ltda. v. GE Med. Sys. Info. Techs., Inc.*, 369 F.3d
 5 645, 652-53 (2d Cir. 2004) (fact that a different party was present in foreign proceedings did not
 6 defeat "same parties" requirement, because purportedly distinct party was close affiliate of one of
 7 the parties in the New York action, and was involved only because of affiliation; holding that
 8 "parties to the two actions are thus sufficiently similar to satisfy the first threshold requirement");
 9 *In re Vivendi Universal, S.A. Sec. Litig.*, No. 02 Civ. 5571, 2009 WL 3859066, at *5 (S.D.N.Y.
 10 Nov. 19, 2009) ("substantial identity of the parties" where domestic action "includes two
 11 individual defendants" and an "undeterminable number of other class members who are not
 12 present in the Paris Action"); *Canon Latin Am., Inc. v. Lantech (CR), S.A.*, 453 F. Supp. 2d 1357,
 13 1365 (S.D. Fla. 2006) (requirement met where "the parties were substantially similar," or where
 14 the "primary parties" are the same; noting that "although SB Technology is an additional party
 15 named in the Costa Rica action, there are no independent claims made against it"); *MasterCard*
 16 *Int'l. Inc. v. Argencard Sociedad Anonima*, No. 01 CIV. 3027(JGK), 2002 WL 432379, at *10
 17 (S.D.N.Y. Mar. 20, 2002) (holding identity of party requirement satisfied despite intervention of
 18 an additional party in foreign proceeding since party was not a necessary party to the action).
 19 Google is a defendant in Brazil solely because Vostu's games run on Google's "Orkut" social
 20 networking platform in Brazil. Zynga's Brazil complaint alleges that, under Brazilian law, Zynga
 21 must name Google as a defendant, since the requested injunction would disrupt the display of
 22 Vostu's games through Google's Orkut service. Brazilian Complaint ¶ 22 & n.14. But any
 23 disruption to Google's service is entirely derivative of Zynga's claims against Vostu, and
 24 Google's presence in the Brazilian caption does not change the fact the parties are the same.

25 **2. The Issues Are the "Same," and Resolution of the U.S. Action Will Be**
 26 **"Dispositive" of the Dispute in the Brazilian Action.**

27 "In cases like this where the parties are the same, whether the issues are the same and the
 28 first action dispositive of the action to be enjoined are interrelated requirements," i.e., to "the

1 extent the domestic action is capable of disposing of all the issues in the foreign action,” the
 2 “issues are meaningfully ‘the same.’” *Applied Medical*, 587 F.3d at 915. The issues between this
 3 action and the Brazilian action are the same, and this Court’s resolution of Zynga’s claims will be
 4 dispositive of the Brazilian action.

5 Although the U.S. and the Brazilian actions are brought under each country’s respective
 6 copyright statutes, “local and foreign issues” may be “functionally the same . . . even though the
 7 foreign action asserted claims under a foreign statute.” *Id.* at 918 (the “issues are not different
 8 here merely because Surgical framed its Belgian action in terms of the Belgian Act”). The “Ninth
 9 Circuit does not require foreign claims to be identical in form to the local claims.” *Id.* See also
 10 *Gallo*, 446 F.3d at 991 (holding that two actions involved the “same claims” because the
 11 substance of defendant’s Ecuadorian court action for statutory violation was breach of contract,
 12 and the substance of plaintiff’s claim in the U.S. action was for, among other things, a declaration
 13 that plaintiff did not breach the contract); *In re Icenhower*, 398 B.R. at 912 (“In the Ninth Circuit,
 14 this requirement is met if . . . the substance of both actions is the same claim even though the
 15 foreign action involves a claim for violation of a foreign statute.”). Nor does it matter if “not all
 16 of the issues are identical,” as long as the resolution of both actions “depend[]” upon the same
 17 legal issues. *Applied Medical*, 587 F.3d at 915 (“it was irrelevant in [*Gallo*] that the Ecuadorian
 18 suit was under an Ecuadorian decree whereas the domestic action was based on California law,
 19 because both clearly depended upon the same alleged violation of a distribution agreement”;
 20 “proper question” not whether issues “identical” but whether “same” in a “functional sense”).

21 Moreover, the “dispositive” test does not formalistically require that the U.S. action
 22 actually “dispose” of the foreign action. “Technically speaking, no action by a United States
 23 court can ever be dispositive of a foreign court’s decision because that court’s determination
 24 about whether to give res judicata effect to a U.S. judgment is governed by comity principles,
 25 which always give a foreign court discretion to determine whether to enforce a U.S. judgment
 26 (absent a treaty stating otherwise).” *In re Vivendi Universal*, 2009 WL 3859066, at *6.

27 Accordingly, in deciding whether the U.S. action will “dispose” of the foreign action, courts
 28 “have focused on whether the substance of the claims and arguments raised in the two actions is

the same.” *Id.* See also, e.g., *Suchodolski Assocs., Inc. v. Cardell Fin. Corp.*, No. 03 Civ. 4148, 2006 WL 10886, at *3 (S.D.N.Y. Jan. 3, 2006) (domestic action “dispositive” of similar claims in Brazil even though the former were asserted under New York law and the latter under Brazilian law because the Brazilian complaint “touched matters” covered by U.S. decision); *SG Avipro Fin. Ltd. v. Cameroon Airlines*, No. 05 Civ. 655, 2005 WL 1353955, at *3 (S.D.N.Y. June 8, 2005) (“Irrespective of choice of law, the parties’ dispute as to the validity of the June 25, 2002, Finance Lease Agreement has been placed before the courts in both the domestic and foreign forums.”); *Aruba Hotel Enters. N.V. v. Belfonti*, 611 F. Supp. 2d 203, 215 (D. Conn. 2009) (dispositiveness requirement was met where the “cases involve the same transactions and the issues are the same”); *MasterCard*, 2002 WL 432379, at *10 (dispositiveness requirement met where “MasterCard seeks in part a declaration under the License Agreement that it may revoke Argencard’s exclusivity, which is precisely the main issue raised by Argencard in the Argentine action”). As the Ninth Circuit has held, anti-suit injunctions are warranted where “[a]djudicating” the same “issue in two separate actions is likely to result in unnecessary delay and substantial inconvenience and expense to the parties and witnesses,” and “could result in inconsistent rulings or even a race to judgment.” *Seattle Totems*, 652 F.2d at 856.

This action is “dispositive” of the dispute in the Brazilian action because U.S. and Brazilian copyright law are substantially similar on the critical legal issues which will dictate the outcome of both cases. See Lemos Decl. ¶¶ 15-22. See also e.g., *Zimnicki v. Neo-Neon Int’l, Ltd.*, No. 06 C 4879, 2009 WL 2392065, at *3 (N.D. Ill. July 30, 2009) (to establish “dispositiveness” must “present[] the Court with evidence that the Chinese intellectual property laws applicable to Neo-Neon’s declaratory judgment action are the same or similar to the provisions of the Copyright Act”).⁶

⁶ Some courts have declined anti-suit injunctions in intellectual property cases, because different countries have different intellectual property regimes. The courts in such cases, however, have emphasized that the substantive law concerning such rights *is different*. See *Computer Assoc. Int’l, Inc. v. Altai, Inc.*, 950 F.Supp. 48, 54 (E.D.N.Y. 1996), *aff’d*, F.3d 365, 371-72 (2d. Cir. 1997) (“the Court finds that the U.S. action cannot be deemed dispositive of Plaintiff’s French [copyright] action as the latter action involves issues that *were neither raised, nor could have been raised*, in the U.S. action” (emphasis added)); *Stein Assocs., Inc. v. Heat & Control, Inc.*,

First, under both U.S. and Brazilian copyright law, if Zynga itself copied from *pre-existing* games the elements of Zynga games that it complains Vostu copied, then Zynga cannot satisfy the threshold requirement of establishing that the purportedly infringed elements are *original* to Zynga. *See* Lemos Decl. ¶¶ 15-19. The U.S. Copyright Act protects “*original* works of authorship.” 17 U.S.C. § 102(a) (emphasis added). As the U.S. Supreme Court held in *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 347 (1991), “originality” is “the touchstone of copyright protection.” Similarly, Brazilian copyright law requires that a work “contain[] a minimal originality” to “deserve[] protection under the Brazilian Copyright Law.” Lemos Decl. ¶ 16. As the Brazilian Superior Court of Justice (Brazil’s highest non-constitutional court) has held, to constitute an “original and protected work under copyright law,” the work must “deriv[e] from a man’s intellectual production, created by exercising such intellect,” and must “demand[] effort and imagination.” *Id.* The São Paulo Court of Appeals, which has jurisdiction to review the decisions issued by the court where Zynga’s case in Brazil is currently pending, has stated that “there must be originality in the work, in other words it must be made up of components that individualize it, in such a way as not to be confused with another preexisting work.” *Id.* ¶ 17. Indeed, Zynga acknowledges that its copyright interests under Brazilian law are essentially identical to its copyright interests under U.S. law, referencing in its Brazilian complaint Zynga’s U.S. copyright registration certificates for the games at issue in both actions. *See* Luetdke Decl., Ex. J ¶ 28 (“The copyright established by law 9.610/98 is independent of registry, but the certificates issued by the North American Copyright Office proves the ownership of ZYNGA” of “rights of ZYNGA over the games that were copied by VOSTU, which are ‘CityVille’, ‘Cafe World’, ‘PetVille’, and ‘ZYNGA Poker.’”).

Second, under both U.S. and Brazilian copyright law, the widespread use of functional or

748 F.2d 653, 658 (Fed. Cir. 1984) (“*British law being different from our own*, and British and United States courts being independent of each other, resolution of the question of whether the United States patents are valid could have no binding effect on the British court’s decision.”). And as noted above, under governing Ninth Circuit law “local and foreign issues” may be “functionally the same” for purposes of an anti-suit injunction “even though the foreign action asserted claims under a foreign statute.” *Applied Medical*, 587 F.3d at 918.

1 stock game elements for common genres—e.g., tables, customers, chefs and cookbooks in “café”
 2 games; cities with streets and plots of land and hamburgers atop fast-food outlets in “city”
 3 games—are unprotectable. *See* Lemos Decl. ¶¶ 20-22. The Copyright Act provides that “[i]n no
 4 case does copyright protection for an original work of authorship extend to any idea, procedure,
 5 process, system, method of operation, concept, principle, or discovery, regardless of the form in
 6 which it is described, explained, illustrated, or embodied in such work.” 17 U.S.C. § 102(b).
 7 “[S]oftware copyright protection does not apply to functionality.” *Amaretto Ranch Breedables v.*
 8 *Ozimals, Inc.*, No. C-10-05696, 2010 WL 5387774, at *2 (N.D.Cal. Dec. 21, 2010). As the Ninth
 9 Circuit has held, under the *scènes à faire* doctrine, “when similar features in a videogame are ‘as a
 10 practical matter indispensable, or at least standard, in the treatment of a given [idea],’ they are
 11 treated like ideas and are therefore not protected by copyright.” *Apple Computer Inc. v. Microsoft*
 12 *Corp.*, 35 F.3d 1435, 1444 (9th Cir. 1994).

13 Similarly, the Brazilian copyright statute, Article 8, provides that “ideas, normative
 14 procedures, systems, methods or mathematical projects or concepts as such” are “excluded from
 15 copyright protection within the meaning of this Law.” Lemos Decl. ¶ 20. Likewise, the Brazilian
 16 software law, Article 6, provides that “the similarity of the program with another, preexisting
 17 program, when this occurs by virtues of the functional characteristics of its application,
 18 compliance with normative and technical precepts, or alternative limitations on its expressions”
 19 shall “not constitute offense to the rights of the software program title-holder.” *Id.* ¶ 20. In
 20 another case by the São Paulo Court of Appeals, the court held that a TV program did not satisfy
 21 the requisites of “novelty and originality,” and could not be “considered an intellectual work
 22 deserving protection, especially in the domain of television, where the free competition leads to
 23 the creation of various segments, many of them similar.” *Id.* ¶ 22.

24 Zynga has conceded as much by drafting its Brazilian complaint as a virtual answer to
 25 Vostu’s counterclaim in this Court on the *scènes à faire* doctrine. Zynga’s primary contention in
 26 its Brazilian complaint is that “Vostu did not merely copy ideas and concepts pertaining to the
 27 genres of games . . . , but also copied ZYNGA’s actual forms of expression for those ideas, in
 28 other words, the videogames themselves.” Luetdke Decl., Ex. J ¶ 7. *See also id.* ¶¶ 8, 30 (“this

1 copy goes beyond the similarities of game styles and themes it not only copied the ideas, but also
 2 the manner these ideas were executed”); *id.* ¶ 32 (“It is important to reiterate that this is not a
 3 mere copying of ideas. Vostu copied and plagiarized the same expression of the ZYNGA video
 4 gaming in blatant unfair competition.”); *id.* ¶ 53 (“The Copyright Law - Law 9.610/98 - broadly
 5 protects intellectual creations, “expressed by any means or fixed in any medium, tangible or
 6 intangible, whether known or invented in the future.” (Art. 7, heading). Exclusivity does not rest
 7 on the idea, but on its “form”); *id.* ¶ 55 (“In this sense, which is protected by copyright is not the
 8 idea, but the expression.”); *see also id.* ¶¶ 12, 49 (referencing the “scenes a faire” doctrine).⁷

9 Finally, the relief Zynga seeks in this Court is virtually the same as that which it seeks in
 10 the Brazilian court. In this action, Zynga seeks an injunction preventing Vostu from “[u]sing,
 11 displaying, exhibiting, reproducing, distributing, selling or offering for sale any product or service
 12 featuring any reproduction or copy of Zynga’s Copyrighted Works, including but not limited to
 13 the Infringing Works,” Compl. at 21, defined as “MegaCity, Café Mania, Pet Mania, Vostu Poker
 14 and MiniFazenda.” In Brazil, Zynga similarly seeks an injunction forcing Vostu “to immediately
 15 cease any use, viewing, editing, reproduction, distribution, sale, offer for sale, serving, or
 16 providing of the video games VOSTU MEGA CITY, VOSTU CAFE MANIA, VOSTU PET and
 17 VOSTU POKER MANIA for any purpose” Luedtke Decl., Ex. J ¶ 79(i)(a). Vostu hosts its
 18 game servers on Amazon servers that are located in the United States. *See* Kafie Decl. ¶ 8.
 19 Zynga also seeks monetary damages in both actions for the alleged infringement.

20 Accordingly, the issues between this action and the Brazilian action are the same, and this
 21 Court’s resolution of Zynga’s claims will be dispositive of the Brazilian action.

22
 23
 24 ⁷ Zynga’s Brazilian complaint also asserts an “unfair competition” claim, but that claim is entirely
 25 derivative of its copyright infringement claim. Lemos Decl. ¶¶ 23-24. *See also* Luedtke Decl.,
 26 Ex. J ¶ 64 (““for a company to make an almost literal copy of four games from its direct
 27 competitor for the same platforms used by the same consumers is somewhat surprising.’ The
 28 technical conclusion confirms the unmistakable form of unfair competition”). Accordingly, this
 Court’s resolution of the copyright issues in this case will resolve not only the Brazilian
 infringement claim, but also the unfair competition claim. Lemos Decl. ¶¶ 23-24

B. The Continuation of the Brazilian Litigation Frustrates This Court's Jurisdiction.

The second requirement for an anti-suit injunction is that the foreign litigation must “frustrate a policy of the forum issuing the injunction.” *Applied Medical*, 587 F.3d at 913 (quoting *Gallo*, 446 F.2d at 991, 994). In this case, permitting the Brazilian litigation to go forward would countenance Zynga’s abuses of the judicial process, in contravention of federal policies against forum shopping, which are designed to prevent precisely the “inconvenience, inconsistency, and ... race to judgment” that Zynga’s simultaneous and cynical pursuit of litigation in multiple international forums would entail. *Ibeto Petrochemical Indus. Ltd. v. M/T Beffen*, 475 F.3d 56 (2d Cir. 2007); *see also Stolt Tankers BV v. Allianz Seguros, S.A.*, No. 11 Civ. 2331, 2011 WL 2436662, at *5 (S.D.N.Y. June 16, 2011) (“the equitable considerations involved, such as deterring forum shopping, also compel enjoining the foreign action.”).

Here, Zynga itself purposefully and originally invoked the jurisdiction of this Court to resolve its copyright disputes. After testing the waters here, it was met with a vigorous defense and was slapped with a powerful counterclaim for declaratory relief that exposed the ultimate frailty of Zynga’s specious claims and examples in support of them. Rather than stand behind the complaint it filed in this Court, Zynga instead repackaged its claims and proceeded to a forum where it was able to obtain an enterprise-threatening injunction without notice to its adversary. Zynga did this even though—and almost certainly *because*—Vostu had fought back in this Court on the very issues that Zynga sought to resolve secretly and without any Vostu participation in the Brazilian forum.

Federal policy disfavors this sort of manipulation of the judicial process and authorizes injunctions to restrain those who engage in such gamesmanship. For example, in *Gallo*, where the plaintiff had agreed to resolve disputes in the California courts but had instead invoked the more truncated procedures of an Ecuadoran forum, the Ninth Circuit issued an anti-suit injunction, holding that the plaintiff’s “potentially fraudulent conduct and procedural machinations” in the foreign venue were contrary to federal policy and warranted relief. 446 F.3d at 993. Similarly, the Second Circuit recently affirmed an anti-suit injunction issued by the

district court on the ground that such relief was necessary to “deter[] forum shopping,” as well as to minimize the risk that a second-filed lawsuit in Nigeria “would result in inconvenience, inconsistency, and a possible race to judgment.” *Ibeto Petrochemical Indus., Ltd. v. M/T Beffern*, 412 F. Supp. 2d 285, 293, *aff’d*, 475 F.3d at 65-66; *see also Stolt Tankers*, 2011 WL 2436662, at *5 (citing “forum shopping,” the “considerable inconvenience in shuttling witnesses between the venues for these two actions,” the fact that “outcomes could be inconsistent,” and that “witnesses and evidence in both actions would likely be the same,” as reasons why injunctive relief was warranted to prevent the plaintiff “to pursue parallel litigation in Brazil while arbitrating the same issues in New York”); *cf. Attwood v. Mendocino Coast Dist. Hosp.*, 886 F.2d 241, 245 (9th Cir. 1989) (holding that “we do not encourage forum-shopping” and that “forum-shopping is an appropriate factor to consider in deciding whether to invoke Colorado River” in the context of requests to enjoin state-court proceedings).

C. The Impact on “Comity” Between the U.S. and Brazil Is “Tolerable.”

The third requirement for an anti-suit injunction is that the impact on comity between the two jurisdictions must be “tolerable.” *Gallo*, 446 F.2d at 994; *see Applied Medical*, 587 F.3d at 919-20 (concluding that anti-suit injunction “would not have an intolerable impact on comity”). While the Court must consider interests of comity, the Court is not required “to genuflect before a vague and omnipotent notion of comity every time that it must decide whether to enjoin a foreign action.” *Gallo*, 446 F.2d at 995 (quoting *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 627 (5th Cir. 1996)). The impact of an anti-suit injunction on comity interests here is minimal to non-existent. In no way can it be described as “intolerable.”

First, comity interests are greatest in disputes over a “public international issue,” *Gallo*, 446 F.3d at 994, or where a foreign government is party to the litigation, *see Applied Medical*, 587 F.3d at 921. That is not the case here. The dispute between Zynga and Vostu is a commercial dispute between private companies, nothing more.

Second, it shows no lack of “comity” to the courts of Brazil to rein in Zynga’s abuses of judicial process. Zynga is not a citizen of Brazil. Zynga is headquartered here, in the Northern District, and this is where it chose to sue Vostu. It was only after Vostu filed its counterclaim in

1 this District—and effectively called out Zynga’s bluster by demonstrating that Zynga is suing for
 2 infringement of elements that Zynga does not own—that Zynga decided to go to a different
 3 jurisdiction, where the court did not afford Vostu a chance to be heard before a decision. Zynga’s
 4 pursuit of the same claims in two different forums shows disrespect to *both* jurisdictions. An
 5 injunction against Zynga to curb these abuses shows respect, not disrespect, for Brazilian courts.
 6 *See Gallo*, 446 F.3d at 989 (“The injunction operates *in personam*: the American court enjoins the
 7 claimant, not the foreign court.”).

8 Third, any impact on comity is considered to be minimal where the pursuit of litigation
 9 abroad would be “vexatious or oppressive.” *Seattle Totems Hockey Club, Inc. v. Nat’l Hockey*
 10 *League*, 652 F.2d 852, 855 (9th Cir. 1981) (quoting *In re Unterweser Reederei GmbH*, 428 F.2d
 11 888 (5th Cir. 1970)). That is an apt description of what has happened here. Notwithstanding the
 12 pendency of Vostu’s detailed counterclaim in this Court, Zynga went into court in another
 13 jurisdiction, and secretly sought and obtained a preliminary injunction, without an injunction
 14 bond, that threatens devastating effect to Vostu. If Zynga believed that it was being irreparably
 15 harmed by the same purportedly unlawful conduct (adjudged under the same standards)—namely,
 16 alleged infringement by Vostu occurring through computer servers located in the United States—
 17 Zynga could and should have sought a preliminary injunction in accordance with the Federal
 18 Rules. Doing so would have required strict compliance with due process, *i.e.*, notice to Vostu and
 19 an opportunity to be heard and to rebut Zynga’s charges, as Vostu demonstrated it was ready,
 20 willing and able to do with its counterclaim and its efforts to engage in expedited discovery prior
 21 to the injunction. *See Luedtke Decl.* ¶¶ 9-14 & Exs. F-H. Zynga instead opted for a procedure
 22 that was likely to (and in fact did) deprive Vostu of the opportunity to be heard and to respond to
 23 Zynga’s claims before an injunction was issued. All this weighs in favor of enjoining Zynga from
 24 continuing this oppressive litigation campaign. *See Gallo*, 446 F.3d 987-88 (enjoining foreign
 25 suit where party was received notice of foreign suit the day before evidence was to be presented);
 26 *Applied Medical*, 587 F.3d at 921 (enjoining foreign suit where same claims were “already being
 27 litigated in the district court”).

28 Fourth, and related, litigation in Brazil would involve both “expense and vexation”

1 because of the “substantial inconvenience and expense to the parties and witnesses” of having to
 2 litigate there. *Seattle Totems*, 652 F.2d at 856 (quoting *Bethell v. Peace*, 441 F.2d 495, 498 (5th
 3 Cir. 1971)). The central issue in both cases is whether Zynga can enforce copyright in protectable
 4 elements of its games against Vostu. An inquiry into whether Zynga’s claimed copyrights
 5 involve material original to Zynga will involve an examination of Zynga’s game development.
 6 Zynga’s witnesses are mainly if not exclusively located in the Northern District of California, not
 7 in Brazil. A great many witnesses on both sides of this dispute would not even be able to speak
 8 the language of the foreign forum (Portuguese).

9 Zynga’s flight to Brazil is nothing more than a cynical attempt “to evade the rightful
 10 authority of the forum court” that it chose, and where Vostu had already fully joined issue by
 11 filing counterclaims with respect to the very same games that Zynga now challenges in Brazil.
 12 *Gallo*, 446 F.3d at 995 (quoting *Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*,
 13 361 F.3d 11, 20 (1st Cir. 2004)). Under these circumstances, “the need for an anti-suit injunction
 14 crests.” *Id.* (quoting *Quaak*, 361 F.3d at 20). This Court has “a duty to protect [its] legitimately
 15 conferred jurisdiction to the extent necessary to provide full justice to litigants.” *Id.* (quoting
 16 *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 927 (D.C. Cir. 1984)).
 17 There is no injustice or offense to comity of requiring Zynga to finish the battle where Zynga
 18 decided to start it and where Vostu vigorously joined it. All three requirements for an anti-suit
 19 injunction are satisfied, and the Court should issue that injunction promptly.

20 **IV. THE BOND FOR THIS ORDER SHOULD BE MINIMAL OR THERE SHOULD**
 21 **BE NO BOND REQUIRED AT ALL.**

22 As required by Federal Rule of Civil Procedure 65(c), the party seeking a preliminary
 23 injunction must post security to cover the “costs and damages as may be incurred or suffered by
 24 any party who is found to have been wrongfully enjoined or restrained.” Fed. R. Civ. Proc. 65(c).
 25 The amount of the bond “will generally be what the court deems sufficient to cover losses and
 26 damages incurred or suffered by the party enjoined if it turns out that the injunction should not
 27 have been granted.” *AT&T Commc’ns of Cal. v. Pac. Bell*, No. C 96-1691, 1996 WL 940836, at
 28 *11 (N.D. Cal. July 3, 1996). The bond here should be minimal, or there should be no bond

